90-1786

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. BROWN and
HENRY M. PRITCHETT,
Petitioners,
v.
THE CITY OF DORAVILLE, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a private conversation by off-duty police officers with a third person concerning police brutality and a promotion scheme measured by traffic ticket production, in the absence of evidence, impedes the ability of the government to deliver police services as a matter of law.

2. Whether the District Court improperly applied the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in granting summary judgment to a municipal employer in action brought pursuant to 42 *U.S.C.* §1983, alleging that disciplinary measures violated public employees' right of free speech.

3. In the alternative, whether the District Court's decision, as affirmed by the Eleventh Circuit of Court of Appeals established a new two pronged First Amendment analysis, thereby omitting the previously required consideration of evidence of whether the protected speech impeded the delivery of governmental services.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Robert J. Brown and Henry M. Pritchett and the respondents, the City of Doraville, Doraville Mayor Gene Lively, Doraville Chief of Police George Everett and Doraville Assistant Chief of Police William F. Davis.

All of the parties below are parties to the proceedings in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Robert J. Brown and Henry M. Pritchett, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 18, 1990 and denial of motion for rehearing entered on February 25, 1991.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Eleventh Circuit was not published but has been reprinted in the appendix hereto, p. 16a, *infra*.

The decision of the United States District Court for the Northern District of Georgia, Atlanta, Division, was not published but has been reprinted in the appendix hereto, p. 2a, *infra*.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 *U.S.C.* §1983, the petitioners brought suit in the United States District Court for the Northern District of Georgia, Atlanta Division. On May 14, 1990, respondents' motion for summary judgment was granted.

On December 18, 1990, the Court of Appeals for the Eleventh Circuit entered an order and judgment, *per curiam*, affirming the Northern District's grant of summary judgment. On February 25, 1991, the Court of Appeals for the Eleventh Circuit entered an order denying the petitioners' Motion for Rehearing.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 *U.S.C.* §1254 (1).

STATUTE INVOLVED

42 *U.S.C.* §1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners, Robert J. Brown and Henry M. Pritchett are veteran police officers employed by the City of Doraville. Prior to being demoted to patrolmen on September 19, 1988, both men were supervisory officers holding the rank of sergeant and lieutenant respectively. The demotions resulted directly from petitioners' exercise of their freedom of speech when discussing allegations of a ticket quota system and police brutality in the City of Doraville Police Department.

On September 13, 1988, Sgt. Brown and Lt. Pritchett were standing in the parking lot of the Doraville City Hall, next to Sgt. Brown's car. Sgt. Brown had just finished testifying in his capacity as a police officer in a session of the Doraville Municipal Court and both officers were off-duty. They were engaged in a conversation between themselves about various matters including promotions within the police department, acts of brutality committed by certain Doraville police officers against citizens and the police department's policy of pressuring police officers to issue large numbers of traffic citations to generate revenues for the City and to reward said conduct with promotions and salary increases.

While the officers were conversing they were approached by James Watkins, an attorney, who serves as a part-time municipal court judge. Mr. Watkins commented to Sgt. Brown about one of the cases he heard earlier that evening and asked Sgt. Brown if he was upset due to the disposition of the case. Sgt. Brown responded

that he was not upset about the case. Mr. Watkins then inquired what Sgt. Brown may have been upset about and then involved himself in the ongoing conversation.

According to Mr. Watkins' account of the ensuing conversation, the officers expressed concerns about departmental promotions, undue emphasis to write traffic tickets to the exclusion of performing other police activities including patrolling residential areas and about incidents of police brutality against the public being inflicted by certain officers in the department. At the time of the conversation both officers considered Mr. Watkins to be a friend. The conversation lasted approximately ten minutes.

Due to his own concerns regarding the content of the conversation, in particular the existence of an incentive system for traffic citations, Mr. Watkins stated he would make a discrete inquiry. Neither Sgt. Brown nor Lt. Pritchett requested that Mr. Watkins take any action and, in fact, requested that he keep the conversation confidential.

The conversation concerned several recent personnel decisions, including promoting an individual from radio dispatch to patrol. As a supervisory level officer, Sgt. Brown was concerned about this promotion due to his perception that the individual was too immature to handle the responsibilities of a patrol officer. Sgt. Brown would have been this individual's immediate superior officer. Sgt. Brown testified to incidents of brutality on the part of an officer who had recently been promoted to supervisory level and that Sgt. Brown feared that such incidents would result in the City being liable

for civil damages. The conversation also included matters related to departmental morale, a traffic ticket revenue scheme which required officers to issue traffic citations to the exclusion of other police work and a lack of competitive bidding for work done for the City. Sgt. Brown testified that he and Lt. Pritchett were concerned for their safety on the street as well as the reputation of the police department in the community.

Petitioners do not deny that matters relating to the police department were discussed. The record is unclear as to whether the portion of the conversation regarding police department matters was initiated by Mr. Watkins or the petitioners. It is clear, however, that Sgt. Brown and Lt. Prichett did not seek out Mr. Watkins in reference to a request, grievance, order or complaint. This is significant as the petitioners were disciplined because their conversation with Mr. Watkins allegedly violated departmental General Order 86-02 (chain of command) prohibiting communications with elected officials and judges in connection with grievances, complaints or case dispositions. *See, infra.* p. 7.

Despite petitioners' desire to have the conversation remain confidential, on the following morning, Mr. Watkins related the substance of the previous evening's conversation to Doraville City Attorney Edward Carter. Mr. Watkins and Mr. Carter share private law office space.

The record reveals that Mr. Carter then telephoned Doraville Mayor Gene Lively to inform him that there was a problem with the police department that needed to be addressed. Mr. Carter told the Mayor that the

department's problem was that Mr. Watkins had been contacted by two officers with complaints about ticket quotas and promotions. The Mayor referred Mr. Carter to Police Commissioner Forrest Fleming.

Mr. Carter then telephoned Mr. Fleming informing him that two officers had complained to Mr. Watkins and that this was not the way people in their position should do things and that it was a serious departmental problem needing to be addressed. Despite conducting no investigation of the circumstances surrounding the conversation with Mr. Watkins or the truth of the matters discussed, City Attorney Carter recommended that the Police Commissioner take disciplinary action against the two officers.

Mr. Fleming conducted no investigation of the facts or truth of the matters discussed and did not discuss the conversation with Sgt. Brown or Lt. Pritchett. Mr. Fleming testified he generally calls an officer in to hear his side of the story prior to discipline but did not do so on this occasion.

Mr. Fleming telephoned Capt. William Davis several days later and explained the contents of the conversation as it had been related to him by Mr. Carter. Mr. Fleming told Capt. Davis he was concerned that a violation of the chain of command had occurred. In choosing to discipline the petitioners, Police Commissioner Fleming apparently ignored the substance of the petitioners' conversation and the fact that two superior officers were concerned with acts of brutality and a traffic citation quota system within the police department.

Capt. Davis also failed to conduct any internal investigation regarding the truth of the matters discussed during the conversation with Mr. Watkins nor did he discuss the matter with Sgt. Brown or Lt. Pritchett. Thereafter, in his capacity as acting Chief of Police, Capt. Davis determined that the conversation warranted disciplinary action.

After discussing the matter with Police Chief George Everett, Capt. Davis and Mr. Fleming ordered both police officers to appear at separate meetings where each officer was handed a memorandum recommending that he be demoted for violating departmental General Order 86-02 (chain of command). General Order 86-02 provides:

> The chain of command will apply to all matters of official business. At no time will any personnel contact any Elected Official in reference to any request or grievance without following the departmental chain of command.
>
> The general order relating to Chain of Command will also cover Judges of the Municipal Court of Doraville. No officer will contact them with a complaint or grievance regarding a case deposition without first following the Chain of Command. [Emphasis supplied].

At the meeting, Sgt. Brown was informed by Capt. Davis and Mr. Fleming that the alleged chain of command violation stemmed from the conversation with Mr. Watkins. Sgt. Brown inquired as to what he had done and was told by Mr. Fleming that he had no loyalty to the City and hurt Mayor Lively's feelings.

Lt. Pritchett was also informed by Capt. Davis and Mr. Fleming that the conversation which occurred between Sgt. Brown and Mr. Watkins had hurt the Mayor's feelings. *Moreover, Mr. Fleming told Lt. Pritchett that loyalty was more important than such things as brutality and that he could put up with somebody "whipping somebody" easier than he could put up with somebody who was not loyal.*

As a result of the off-duty private conversation Sgt. Brown and Lt. Pritchett had with Mr. Watkins, both officers were immediately demoted from their supervisory positions to the rank of patrolmen. The demotions resulted in reductions in pay and benefits.

Petitioners' complaint, under 42 *U.S.C.* §1983, alleged deprivations of constitutional rights of due process and freedom of speech. Petitioners alleged that they were demoted from their positions as supervisory officers with the City of Doraville Police Department as a direct result of the off-duty private conversation with an individual who serves as an appointed, part-time municipal court judge. It was further alleged that the demotions were motivated by the City's desire to silence and cover-up issues of public concern to the citizens of the City of Doraville.

After extensive discovery, the respondents filed a motion for summary judgment which the District Court granted. As to the claims for First Amendment violations, the trial court determined that although the speech at issue involved matters of public concern, the balance between the petitioners' interest in freedom of speech and of the City's interest in discipline weighed in

favor of the City. Petitioners contend that the district court erred in striking the balance against their First Amendment rights and in granting summary judgment to the City on the First Amendment claims.

On *de novo* review in the Eleventh Circuit Court of Appeals, the petitioners argued primarily that the record below failed to contain any evidence that the private conversation with Mr. Watkins impeded or had the potential to impede the delivery of police services. The petitioners argued that in the absence of such evidence, the trial court erred in its application of the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and striking the balance in favor of the City. The petitioners contend that, as a matter of law, where no evidence of any actual or potential impact on the delivery of police services is introduced by the defense, summary judgement is not appropriate.

The Eleventh Circuit affirmed the decision holding that the record supported the balancing done and the findings of the trial court. The Eleventh Circuit also denied petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc.

Petitioners contend that, in light of the absence of any evidence that the protected speech impeded or had the potential to impede the delivery of police services, the Eleventh Circuit decision affirming the trial court's order in all respects, is in direct conflict with or has modified prior decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Petitioners contend that the balancing test set forth *Pickering v. Board of Education*, 391 U.S. 563 (1968) and

Rankin v. McPherson, 483 U.S. 378 (1987) and applied in *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986) and *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) has now been modified to eliminate the requirement that the governmental employer demonstrate that the protected speech impeded or had the potential to impede the delivery of governmental services. Accordingly, under the construction given *Pickering* by the trial court and the Eleventh Circuit in this case, a governmental employer is entitled to summary judgment, as a matter of law, in First Amendment employment cases without being required to show any evidence that the protected speech impeded or had the reasonable likelihood to impede the delivery of services. The Eleventh Circuit has effectively eliminated one of the essential three prongs of the *Pickering* balancing test.

REASONS FOR GRANTING THE WRIT

IN THE ABSENCE OF EVIDENCE THAT THE PROTECTED SPEECH IMPEDED THE CITY'S ABILITY TO DELIVER POLICE SERVICES, AS A MATTER OF LAW, SUMMARY JUDGMENT WAS NOT APPROPRIATE.

In considering the motion for summary judgment, the district court preliminarily ruled that the petitioner's speech involved a mix of matters both related and unrelated to public concerns. Accordingly, the district court considered all of petitioners' speech as protected by the First Amendment. *See, Kurtz v. Vickery*, 855 F.2d 723 (11th Cir. 1989). The district court then proceeded to apply the *Pickering* balancing test.

Pickering requires that three factors be considered in balancing the government's interests against an employee's right to free speech: 1) whether the speech at issue impedes the government's ability to perform its duties efficiently; 2) the manner, time and place of the speech; and 3) the context within which the speech was made. *See, Morales v. Stierheim*, 848 F. 2d. 1145 (11th Cir. 1988), *cert. denied sub nom., Leon v. Avino*, ____U.S.____, 109 S.Ct. 1124 (1989).

The district court found that the context, manner, time and place of the speech were reasonable and therefore, the second and third steps of the *Pickering* test weighed in petitioners' favor. However, when considering the first factor in the *Pickering* test, i.e., whether the speech impeded the government's ability to perform its duties effectively, the district court held that the speech in question "could have a detrimental effect on the department" in that it brought into question "superiors' decision making" which "could undermine their authority and affect morale." The trial court concluded that in the balance the City's interest in efficient operation of its police department outweighed petitioners' right to free speech or exposure of police brutality.

The only evidence relied upon by the district court to support this finding was the deposition testimony of Police Commissioner Forest Fleming which is devoid of any evidence that the speech would have a detrimental effect on the operation of the police department. A review of the deposition reveals that Mr. Fleming's testimony contains nothing more than his personal opinion that Sgt. Brown may have discussed "his

thoughts" with other patrolmen on a previous occasion and that Sgt. Brown had written a letter some two years prior to his demotion. Obviously, neither of these two prior events was related to the private conversation with Mr. Watkins for which the petitioners were demoted. Moreover, Mr. Fleming's opinion is simply not evidence tending to show that petitioners' speech had any impact much less an adverse impact on the police department or the delivery of police services.

Aside from Mr. Fleming's testimony, no other affidavits, testimony or evidence was offered by the defense that the conversation with Mr. Watkins impeded or had the potential to impede the delivery of police services. Petitioners contend no such evidence could have been offered by the defense as none existed. There is no evidence that petitioners communicated the contents of the private speech to anyone else. Aside from Mr. Watkins' discussion with Mr. Carter, the content of the subject speech was not disseminated to anyone else. Thus, it is inconceivable that the private conversation could have had any impact at all on the Doraville Police Department.

The complete lack of evidence is reflected in the court's order granting summary judgment which specifically states that there exists no direct evidence that the statements at issue had any impact. The district court indicated that the only impact was the "Defendants' perception" of disloyalty and of a threat to discipline. Clearly the record did not support the district court's conclusion that the conversation with Mr. Watkins actually impeded or had the potential to impede the efficient delivery of police services.

The district court's analysis altered the *Pickering* test by amputating one of its three prongs. The result of eliminating the "impediment prong" from the *Pickering* test is that all subsequent First Amendment cases arising in the Northern District of Georgia will be decided contrary to the test announced by this Court in *Pickering*.

In this case, the district court recognized there was no unequivocal evidence that the speech had any impact, let alone a disruptive impact, on the police department. In order to meet their burden on summary judgment, the defendants were required to show more than rank speculation and unsupported conjecture. Petitioners submit that given the absence of evidence, the perception of one witness of disloyalty, based upon events, unrelated to the speech in issue, can not satisfy the defense burden on summary judgment.

The sole issue considered on appeal to the Eleventh Circuit was whether the district court erred in striking the balance in favor of the governmental employer where the record was devoid of evidence that the speech at issue impeded the City's ability to perform its police duties efficiently. Upon *de novo* review of the record, the Eleventh Circuit found that the record supported the district court decision.

Petitioners submit that as a result of affirming the district court, the Eleventh Circuit has adopted the district court's truncated version of the *Pickering* analysis. Thus in the Eleventh Circuit, a governmental employer is now entitled to summary judgment as a matter of law in an action arising from a decision to discipline a police officer for exercising his right to free speech, privately and off-

duty, even where the employer has made no evidentiary showing that the speech could reasonably impede the ability of the police department to deliver services.

This construction of *Pickering* is in direct conflict with *Rankin v. McPherson*, 483 U.S. 378 (1987); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986) and *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982). These decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals, whether decided favorably or unfavorably to the employee, all provide a correct statement and application of the *Pickering* test and the analysis required thereby. A review of the courts' treatment of the evidence of actual or potential disruption of police services resulting from the speech at issue in the aforementioned cited opinions reveal the obvious error in the instant case.

In *Rankin*, a deputy constable commented to a fellow employee after hearing of an assassination attempt on the President, "If they go after him again, I hope they get him." The deputy was discharged. On two occasions, the district court granted summary judgment to the governmental employer as to McPherson's First Amendment claim on the basis that the speech was not protected. On both appeals, the Fifth Circuit Court of Appeals reversed. Certiorari was granted after the second reversal.

This Honorable Court affirmed. The majority recognized that in accordance with *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), the employer bore the burden of justifying the discharge on grounds which did

not violate the employee's First Amendment rights. The majority held that in the complete absence of evidence that the speech interfered with the functioning of the constable's office, the employer failed to meet that burden and the deputy's speech was to be protected. *Rankin*, 483 U.S. at p. 378.

As in *Rankin*, the employer in the present case produced no evidence that the conversation at issue interfered or was likely to interfere with the functioning of the Doraville Police Department. As in *Rankin*, the employer failed to carry its burden and should not have prevailed on summary judgment. The decisions of the district court and the Eleventh Circuit in this case clearly deviated from the analysis used in *Rankin*.

The *Bryson*, *Eiland* and *Waters* cases demonstrate that the district court and the Eleventh Circuit also deviated from the precedents in the leading cases in the Eleventh Circuit with respect to the employer's burden to show that the speech did or reasonably could have interfered with delivery of police services.

In *Bryson*, the trial court's determination that speech uttered by a demoted police officer was not protected was affirmed. On *de novo* review, the Eleventh Circuit outlined the evidence relating to the likelihood that the speech would interfere with the delivery of police services. The record showed that Bryson bitterly complained to all who would listen in the police department and that officers avoided the police station because of Bryson's animosity toward the chief. There was also direct testimony from several witnesses that Bryson's

conduct caused substantial interference with police operations.

In contrast to *Bryson*, there was absolutely no such evidence in the petitioners' case. There was no evidence of bitter complaints by petitioners, no evidence of any impact on other officers and absolutely no evidence of any disruption of police operations. Moreover, the conversation for which petitioners were demoted took place essentially between themselves and only involved a third party when Mr. Watkins took the steps to get involved in the conversation. Moreover, it was Mr. Watkins, for reasons known only to him, and not petitioners who communicated the content of the conversation.

In *Waters*, the police officer was disciplined for making disparaging remarks about the chief of police to another officer while off-duty and in a bar. Officer Waters was demoted for insubordination after the second officer, whom Waters considered a friend, filed a report describing the incident. Upon bench trial, the district ruled that the remarks were not protected speech and did not infringe on Waters First Amendment rights.

On appeal, the Eleventh Circuit considered the employer's general assertions that Waters' remarks could harm the close working relationship of the department and undermine morale. The Eleventh Circuit reversed finding that generalized concerns for morale and working relationships were not a sufficient showing of a reasonable likelihood of adverse harm to the department, its efficiency, discipline or harmony.

Similarly in *Eiland,* a police officer was demoted for typing and authoring a part of a poem critical of the mayor. The poem was typed in the police department and posted on bulletin boards in the department.

In reversing a judgment upon a jury verdict for the employer, the Eleventh Circuit focused on the evidence of the potential disruption factor in the *Pickering* test. The court reviewed the evidence and concluded that although some witnesses expressed concern over the need for discipline and respect within the department, the evidence was almost uniformly based upon assumption and speculation and that there was no affirmative evidence of adverse effects from the poem. The court recognized that an employer need not allow events to deteriorate to the point of actual disruption before acting. However, the court also noted that the need for discipline as an *abstract concern* should not be allowed to overshadow individual interests in free speech. *Id.* at 959.

As in *Eiland,* there was no evidence in this case warranting the trial court's conclusion that the speech impeded the ability of the police department to perform its governmental function. Clearly, in absence of any real evidence of actual or potential disruption to police services the *Pickering* analysis requires a finding in favor of the disciplined employee.

CONCLUSION

A private off-duty conversation regarding issues of public concern does not as a matter of law impede the ability of a police department to provide police services. In the absence of any evidence that the conversation

actually impeded or was reasonably likely to impede the delivery of police services, the *Pickering* balancing test requires that summary judgment not be granted for the employer. By affirming the district court, the Eleventh Circuit Court of Appeals has modified the *Pickering* test to a two prong standard. This decision will have a far reaching impact on all future free speech cases arising within the Northern District of Georgia and should be reviewed on certiorari.

Furthermore, the decision has a freezing effect on law enforcement officers who wish to come forward with evidence of brutality by fellow officers or municipal corruption. The present decision reinforces the code of silence and provides the municipal employer with both a sword and a shield for use in future litigation. Police officers should be encouraged by their employers to come forward with evidence of illegal conduct by fellow officers and should be free of threats of demotion for exercising their free speech rights. Therefore, it is respectfully requested that the Writ of Certiorari be granted.

This 17th day of May, 1991.

Respectfully submitted by:
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APPENDIX OF PETITIONERS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT J. BROWN and :
HENRY M. PRITCHETT :

vs. CIVIL NO. 1:89-cv-189-ODE

THE CITY OF DORAVILLE, :
GENE LIVELY, Individually, :
and as Mayor of the City of :
Doraville, GEORGE EVERETT, :
Individually, and as Chief of :
Police of the City of Doraville, :
WILLIAM F. DAVIS, :
Individually, and as Captain :
of the City of Doraville :
Police Department :

ORDER

This civil rights action is before the court on Defendants' motions to extend time to file motion for summary judgment and for summary judgment. Plaintiffs move to strike Defendants' motion for summary judgment and their reply brief.

This action arose after Plaintiffs, who work for the Doraville, Georgia police department, were demoted to the rank of patrolmen, effective September 10, 1988.[1] The alleged reason for their demotions was a violation of general order 86-02, which covers the chain of command

[1]Plaintiff Brown was demoted from the rank of sergeant; Plaintiff Pritchett from the rank of lieutenant.

in relation to personnel grievances.[2] It specifically prohibits personnel from contacting any elected official with regard to any request or grievance without first informing their superiors in the police department.

The purported violation of the chain of command rule arose from a conversation in a parking lot between Plaintiffs and a municipal court judge after court on September 13, 1988, while Plaintiffs were off duty. At his deposition, Plaintiff Brown testified that just prior to the conversation at issue, he and Plaintiff Pritchett were criticizing some promotions made that day by their superiors. Plaintiff Brown stated that they "were a little ill and were blowing off some steam." He indicated that the judge "was drawn into the conversation by that" as he left the courthouse and passed them. Plaintiffs both testified that the conversation then continued in the same vein in the presence of the judge.

Specifically, Plaintiff Brown testified that he told the judge that he was upset over the promotions. He stated that he probably named at least two individuals whose promotions he felt were a mistake. He testified that told

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[2]General order 86-02, dated November 1, 1986, states:

The phrase "CHAIN OF COMMAND" is defined as: The orderly passing on of orders, complaints, requests and discipline from all personnel.

The CHAIN OF COMMAND will apply to all matters of official business. At no time will any personnel contact any *Elected Official* in reference to a request or grievance without following the departmental chain of command.

The General Order relating to CHAIN OF COMMAND will also cover Judges of the Municipal Court of Doraville.

No officer will contact them with a complaint or grievance regarding a case disposition without first following the CHAIN OF COMMAND....

the judge why he was upset. His testimony indicates that the reasons he disagreed with the promotions were because one individual, who was promoted from a radio position to a patrol officer, was immature. At his deposition, he also stated that he discussed the promotion of a female officer, who he felt lacked supervisory and decisionmaking abilities and was not punctual; he stated that he felt she was promoted because of her sex. Plaintiff Brown also testified that he told the judge the reasons he was upset over a third promotion. The reasons he stated were that the officer was promoted because of his ticket writing and he was concerned because earlier, the officer had punched an arrestee in the mouth. Plaintiff Brown also testified that he probably mentioned his concern about some maintenance work done on city property, a fence built at a local park and grass purchased that were done without bids. He was unsure about whether he simply expressed his concerns over things being done without bids, or discussed the above mentioned details specifically.

Plaintiff Pritchett testified that they also discussed the department's emphasis on ticket production at the expense of patrols of the residential and business districts and concern about job security. He also stated they discussed the inexperience of one officer who was promoted, his concern regarding the reluctance of the female officer in responding to calls and that a third officer was promoted for his ticket production.

At his deposition, Plaintiff Brown indicated that he spoke to the judge as a friend, not as a public official and he asked the judge to keep the conversation confidential. Plaintiff Brown stated that it was not his intention that

the conversation, which lasted fifteen or twenty minutes, be made public.

The judge stated at his deposition, when asked about the conversation at issue, that Plaintiffs

> were upset about some promotions that had just been announced that day...they were angry... They were concerned about one or two officers, who I don't think they felt should have been promoted. They were concerned about the ticket situation. They felt that too much emphasis was being placed on the number of tickets that were being written as opposed to the policing that was being done.

The judge also said that they were concerned about the overzealousness of some officers in handling arrests. The judge stated that when the conversation was over, he told Plaintiffs he would make a discrete inquiry about these matters the next morning.

Subsequently, the judge asked the city attorney about these issues. According to the judge's deposition testimony, on hearing the substance of the complaints, the city attorney immediately identified Plaintiffs as the speakers and contacted several other city officials, including Defendant Lively, the mayor, and Defendant Fleming, the police commissioner.[3]

After learning of the conversation at issue, Defendant Davis, the acting chief of police, allegedly determined that disciplinary action was appropriate. He and Defendant

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[3] The record indicates that at least one of the Plaintiffs had expressed these concerns to various Doraville officials before.

Fleming subsequently discussed the matter with Defendant Everett, the police chief, who was hospitalized. The men allegedly agreed that Plaintiffs should be demoted.

On September 15, 1988, Defendants Davis and Fleming met with each Plaintiff and presented them a memorandum which they and Defendant Everett had signed, recommending their demotion for violating the chain of command rule with regard to their conversation with the judge. Plaintiffs allege that they were told by Defendant Fleming that they had no loyalty and had hurt the mayor's feelings.

Plaintiffs claim that the demotion violated their first amendment rights, in that the conversation touched on matters of public concern. They assert that general order 86-02 is unconstitutionally vague and overbroad as applied and that they did not violate it because the judge contacted them and the conversation occurred while they were off duty. Plaintiffs also assert that Defendants demoted them without due process of law. Plaintiffs further allege that the police department's practice of concentrating its officers' efforts in traffic related duties is potentially dangerous to the community.

Plaintiffs seek reinstatement to their former ranks and recovery of all accrued salary and benefits they would have received absent the demotion. In addition, they seek compensatory and punitive damages, costs and fees.

Defendants move for summary judgment,[4] asserting that Plaintiffs are at will employees who have no property interest in their positions. Thus, according to Defendants, both Plaintiffs' procedural due process claims and the substantive due process claims relating to general order 86-02, must fail. Defendants further argue that in this circuit a valid substantive due process claim must allege facts so egregious that they shock the conscience. They maintain that no such evidence exists in this case. Defendants further contend that the city has a compelling interest maintaining order and discipline in the police departments which is promoted by the general order.

In addition, Defendants assert that they are entitled to qualified immunity because no reasonable official would have known that their actions violated clearly established law in light of the city charter's authorization that they could fire, hire and supervise city employees.

As to Plaintiffs' first amendment claims, Defendants maintain that the speech at issue addressed personnel matters and did not touch on matters of public concern. Defendants cite Plaintiffs' own testimony as evidence. Defendants further argue that even if Plaintiffs' speech touched on matters of public concern and was therefore covered by the first amendment, their demotions were justified absent the protected speech. Defendants assert that, as stated in the demotion memo, Plaintiff Pritchett failed to properly perform supervisory duties and Plaintiff

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[4] Defendants' motion for an extension of time in which to file this motion is GRANTED. Justice and judicial economy will be better served by reaching the merits of Defendants' motion. For the same reason, Plaintiffs' motions to strike Defendants' motion for summary judgment and their reply brief on timeliness grounds are DENIED.

Brown had previously violated the chain of command order by surreptitiously sending several officials, including Defendant Lively, the mayor, a letter criticizing the way the police deparment was being run. Defendants further state that even if Plaintiff's speech was protected, the compelling governmental interest in the organized, disciplined and orderly operation of the police department outweighs Plaintiff's interest in speaking out on these matters.

In response, Plaintiffs argue that their conversation with the judge addressed matters of legitimate public concern, thus triggering first amendment protection. These matters included the pressure being placed on patrol officers to issue traffic citations, rather than protecting homes and businesses and the department's promotion policy, which purportedly was based on the amount of revenue generated through traffic citations. In support of this contention, Plaintiffs present testimony from several of their fellow officers asserting that they were pressured to issue traffic citations, the production of which would be rewarded by salary increases and promotions. Plaintiffs state that using traffic law enforcement to raise revenue violates O.C.G.A. §40-6-9(b). Plaintiffs further maintain that their speech in no way impeded police functions, thus their first amendment interest outweigh any of Defendants' interests in maintaining departmental discipline and loyalty.

As to the due process claim, Plaintiffs maintain that general order 86-02 only prohibits officers from complaining to judges about the disposition of cases. They argue that they did not violate the chain of command rule because their speech did not involve the disposition of a

case. Plaintiffs assert that they possess a legitimate claim of entitlement to be free from adverse personnel action pursuant to the rule when their actions did not violate it. They maintain that Defendants' application of the rule denied them substantive due process.

Plaintiffs further argue that Defendants are not entitled to qualified immunity, because the chain of command rule was not violated. They also assert that the contours of their first amendment rights under these circumstances are sufficiently well established that a reasonable person in Defendants' position should have known that the demotions were unconstitutional.

Summary judgment is appropriate only if the evidence reveals the absence of any genuine issues of material fact and shows that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The evidence must be viewed in the light most favorable to the nonmovant. *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970).

In order for the first amendment claim to survive Defendants' motion, Plaintiffs must establish that they were engaged in a protected activity. *Connick v. Myers*, 461 U.S. 138, 147 (1983). In this context, for speech to be protected, it must touch on "a matter of legitimate public concern upon which free and open debate is vital to informed decision making by the electorate." *Id.* at 145 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968)). Whether such speech addresses a matter of public concern must be determined by its "content, form and context...as revealed by the entire record." *Id.* If this threshold requirement is met, then the court must

examine the evidence and weigh the employee's interest in speaking out on a matter of public concern against the employer's interest in maintaining an efficient and productive workplace. *Id.* at 140.

The evidence presented indicates that the content of the speech at issue primarily concerned Plaintiffs' philosophical differences with their superiors over the appropriateness of promotions and the connection between promotions and traffic citation production. Its form and context, in a casual conversation following several promotions with which Plaintiffs did not agree, supports the conclusion that the speech was an expression of personal dissatisfaction over personnel decisions.

The court is of the opinion that for most part, Plaintiffs were speaking out as employees on matters of personal interest relating to personnel assignments and promotion criteria, not on matters of public concern. The alleged aggressiveness of one officer who received a promotion might arguably address a matter of public concern. However, the context in which this was raised is so intimately connected with the criticisms over promotions, that in this situation it does not rise to the level of constitutionally protected speech.

Yet, "the meaning of the term 'public concern' is not without ambiguity." *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1989). The unavailability of patrolmen to respond to calls because of their assignment in radar units and Plaintiff Brown's testimony regarding the absence of bidding on certain municipal projects are issues of more than personal interest. Therefore, since some of Plaintiffs' speech arguably addresses matters of public concern, the

court will proceed to the next step required in a first amendment analysis, the weighing of the parties' interests. Because Plaintiffs' speech is "mixed," in that some of it may relate to matters of public concern and some does not, it will all be treated as protected for the purposes of this analysis. *Kurtz*, 855 F.2d at 733.

The first amendment balancing test "is not performed in a vacuum." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). The court may consider the circumstances surrounding a personnel decision. *Id.* Moreover, the government's burden in justifying its action "varies depending on the nature of the employee's expression." *Connick* at 150.

In its analysis, among the things the court must consider are "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989).

On the issue of to whether Plaintiffs' impeded the government's efficiency, the court must examine "whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

In this case, Plaintiffs' speech could have a detrimental impact on the department, in that it brought Plaintiffs' superiors' decisionmaking abilities into question, which could undermine their authority and affect morale. It could also affect the co-workers who

received the promotions. Moreover, the statements were made about individuals with whom Plaintiffs worked closely. *Pickering*, 391 U.S. at 572. Defendant Fleming testified that in his discussion with Defendant Davis and Everett regarding the decision to demote Plaintiffs he cited Plaintiffs' disloyalty to the department as superior officers. He characterized Plaintiff Brown as an instigator of a morale problem by criticizing promotions and not accepting the city's decision, which he defined as disloyalty. Admittedly, there is no direct evidence that the statements at issue here had any impact, other than Defendants' perception of disloyalty and the threat to discipline by Plaintiffs' alleged violation of the chain of command. However, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick* at 152.

Basically, the time, place and manner of the speech weighs in Plaintiffs' favor. They were off duty, outside the department and the statements were made in what they considered to be a private conversation. However in continuing the conversation in the presence of the judge, Plaintiffs violated the spirit, if not the strictly construed letter of the chain of command rule, which strengthens Defendants' position. *See Connick* at 153 n. 14.

As to the context in which the speech was made, this is not a case where employees, out of their disinterested civic concern, discussed the city's emphasis on ticket

production and municipal bidding[5] with an official. It was no coincidence that the conversation at issue occurred on the heels of several promotions. Moreover, Defendant Fleming testified that Plaintiffs had been complaining about morale and their dissatisfaction with policies set by their superiors over many months and that Plaintiff Brown "was creating...[morale] problems by discussing his thoughts with all the patrolmen, making people choose sides." Lieutenant Davis also testified that Plaintiffs "always did gripe a lot."[6]

Connick held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The evidence is uncontroverted that the promotions were the conversation's focus. It touched matters of public concern only in the most limited sense. The speech at issue is most fairly characterized as an expression of employee dissatisfaction with office policy. The limited first amendment interest involved in this case did not require Defendants to tolerate what they viewed as a

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[5] When Plaintiffs and the judge were asked on deposition what was said outside the courthouse, only Plaintiff Brown recalled mentioning the bidding issue.

[6] In addition, several years earlier, Plaintiff Brown sent a five page letter to the mayor, the police chief and Defendant Davis criticizing personnel decisions, including a decision involving one of the individuals Plaintiff later discussed with the judge. The letter indicated that he discussed the propriety of this individual's promotion with others in the department.

violation of the chain of command rule and behavior undermining their authority.[7]

The court turns to the substantive due process issue.[8] Even if Plaintiffs did not violate the rule, their substantive due process claim cannot survive Defendants' motion.

Substantive due process is violated only when the government's actions "'shocks the conscience' or constitutes force that is so 'brutal' as to 'offend even hardened sensibilities.'" *Faucher v. Rodziewicz*, 891 F.2d 864, 871 (11th Cir. 1990) (quoting *Rochin v. California*, 342 U.S. 165, 172-173 (1952)). The application of the chain of command rule in this case does to constitute such an action.

Because Defendants did not violate Plaintiffs' constitutional rights, the court need not reach the issue of qualified immunity.

Accordingly, defendants' motion for an extension of time in which to file a motion for summary judgment is GRANTED. Plaintiffs' motions to strike Defendants' motion for summary judgment and their reply brief are

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[7] Under these circumstances, where the chain of command rule does not regulate speech in a public forum and does not prohibit speech to elected officials, but only channels its direction, and where Defendants have asserted a compelling interest in the orderly and effective operation of the police department, the court likewise cannot say that general order 86-02 violates the first amendment. *See Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

[8] Because Plaintiffs do not address the procedural due process issue in their response and it appears that they were at will employees, the court assumes Plaintiffs do not contest that aspect of Defendants' motion.

DENIED. Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 14 day of May, 1990.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8566

D. C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and

HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(December 18, 1990)

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM:

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

The sole issue presented in this appeal is the correctness of the balancing done in accord with Pickering v. Board of Education, 391 U.S. 563 (1968). We find the record fully supports the conclusions of the district court as set forth in its Order of May 14, 1990.

The judgment is AFFIRMED.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8566

ROBERT J. BROWN and HENRY M. PRITCHETT

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 18, 1990, 11th Cir., 19__, ____F.2d____).

Before: FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

United States Court of Appeals

For the Eleventh Circuit

No. 90-8566

D.C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and
HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court..

Entered: December 18, 1990

For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 6 1991

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

(2)

90-1786

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. BROWN and
HENRY M. PRITCHETT,
Petitioners,
v.
THE CITY OF DORAVILLE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court correctly applied the "*Pickering* balancing test" in granting summary judgment to a municipality and its police officials in a First Amendment action brought by employee police officers who were demoted as a result of their criticism of decisions made by their superiors concerning promotions, manpower assignments and departmental policies and practices.

LIST OF PARTIES

The parties to the proceedings below and in this Court are the Petitioners, Robert J. Brown and Henry M. Pritchett, and the Respondents, the City of Doraville, Doraville Mayor Gene Lively, Doraville Chief of Police George Everett and Doraville Assistant Chief of Police William F. Davis.

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No. _____

IN THE

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OCTOBER TERM, 1991

ROBERT J. BROWN and
HENRY M. PRITCHETT,
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v.
THE CITY OF DORAVILLE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals was not published but has been reprinted in the Appendix hereto, page 16a. The decision of the District Court also was not published but has been reprinted in the Appendix hereto, page 1a.

STATEMENT OF JURISDICTION

The Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The defendant City of Doraville (the "City") employs the Petitioners as police officers. This action arises from the decision of the Chief of Police and the Assistant Chief to demote the Petitioners from their positions as ranking officers based, in part, upon the Petitioners' remarks about the operation of the Police

Department and criticism of decisions regarding promotions and manpower assignments. In addition to the City, the other named defendants are elected and appointed officials who are charged with overseeing the operation of the Police Department, the Mayor, the Chief of Police, and the Assistant Chief of Police.

The deposition testimony of the Chief, the Assistant Chief, and the Police Commissioner, as well as documents prepared at the time of the demotions, show that the Petitioners were demoted for violating the chain of command rule, for being disloyal and unsupportive of the decisions of their superiors, and for other prior misconduct. The department officials concluded that the Petitioners had violated the chain of command rule by making numerous derogatory comments about the Police Department to each other and to a municipal court judge. The Petitioners' comments included criticism about recent promotions, raises and manpower assignments made by their superiors, and remarks about how they felt the Department should be run.

The Respondents believed the Petitioners' comments and failure to follow the chain of command, in view of similar misconduct and complaints in the past, demonstrated the Petitioners were unsuited for supervisory level positions. Therefore, the Respondents demoted the Petitioners to regular patrol officers as of September 19, 1988, and both of the Petitioners have continued to serve as police officers for the City since that time, approximately two and one-half years now. The following is a brief summary of the incident which culminated in the Petitioners' demotions, with attention placed upon the details which demonstrate the

time, place, manner and context of the Petitioners' purported speech, all of which is relevant to the First Amendment analysis.

On September 13, 1988, Petitioner Brown, while in uniform and fulfilling his official duties, was standing in the parking lot of the City Hall. Petitioner Pritchett was also present. Brown and Pritchett were discussing their disagreement with recent promotions and other decisions made by their superiors, the Respondents. The Petitioners had just heard about the promotions and raises which were made that day, and they were criticizing those decisions to each other.

As a municipal court judge left the building and passed the Petitioners, he inquired as to the subject of their discussion, as they appeared to him to be upset. After some initial comments, the Petitioners continued to criticize the decisions which had been made by their superiors regarding promotions, raises and manpower assignments. They also expressed dissatisfaction with what they perceived to be an undue emphasis on issuing traffic citations as opposed to doing other law enforcement activities. While there is some question about what all was said during the three way conversation, the municipal court judge testified that he clearly got the impression they were upset *about the promotions*.

Petitioners Brown and Pritchett conceded in their deposition testimony that they specifically complained about the promotions of certain officers to the municipal court judge. Pritchett testified that the reason he was demoted was because he voiced his opinion about those matters and it was something that the Department did not want to hear. Brown confirmed that Pritchett and he

were speaking as disgruntled employees and were "blowing off steam" by complaining about promotions, raises, writing traffic tickets, and various other matters.

The municipal court judge ultimately related the Petitioners' criticism to the Police Commissioner, who in turn advised the Chief and Assistant Chief. The Police Commissioner Forest Fleming testified that he was aware of the Petitioners' past history of being disgruntled employees, stating that the Petitioners "[were] never happy with anything that we did; it didn't make any difference ... it was a continuous problem of not accepting the policies of [the] police department, creating turmoil." Deposition of Forest Fleming, p. 26. When Commissioner Fleming discussed the Petitioners' remarks with Major Davis, the Assistant Chief of Police, Davis decided that the Petitioners should be demoted from their positions as ranking officers for making those comments and for failing to following the chain of command to express grievances. The Chief of Police approved Davis' decision to demote.

The Assistant Chief then prepared typewritten documents notifying the Petitioners that they were being demoted, and Commissioner Fleming and he hand delivered the documents. In addition to the written notices, Davis and Fleming orally explained all the reasons for the demotions. They advised Petitioner Brown that he was being demoted for violating departmental chain of command on two separate occasions, the most recent occurring with the remarks made to the municipal court judge and the other had occurred a couple of years earlier when Brown sent a letter to the Chief and Assistant Chief criticizing personnel decisions. Indeed, Petitioner

Brown testified on deposition that Major Davis' opinion about his previous letter was "that I was trying to second guess him and tell him he didn't know how to run the department...." Deposition of Robert J. Brown, p. 90.

Davis and Fleming advised Pritchett that he was being demoted for violating the chain of command by voicing criticism to the municipal court judge and for other reasons. The written document addressed to Pritchett listed the additional reasons for his demotion as being (1) failing to following departmental regulations and policies by not conducting roll call before the beginning of his shift, (2) not consulting with the off-going shift commander, and (3) not performing his overall duties as a shift commander in a satisfactory manner. Fleming and Davis advised Petitioners at that time that their remarks about the Department not only constituted a violation of the chain of command but also demonstrated their disloyalty, poor attitude, and inclination to create dissension by criticizing their superiors' decisions and their fellow officers. On January 30, 1989, Petitioners filed their Complaint in this action, seeking to recover pursuant to 42 U.S.C. § 1983 for alleged deprivations of constitutional rights. The Respondents answered the Complaint, denying that they had violated any of Petitioners' constitutionally protected rights and stating that the Petitioners were demoted because of their violation of the chain of command rule and because their conduct demonstrated an ongoing inability to handle supervisory level positions.

After the close of discovery, Respondents filed a Motion for Summary Judgment as to all claims. On May 14, 1990, the District Court granted the Motion for

Summary Judgment and judgment was entered in Respondents' favor. Relevant to the question presented, the District Court found that while the Petitioners' speech arguably touched upon matters of public concern, the governmental interests at stake outweighed the Petitioners' right to free speech under the *Pickering* balancing test.

In making its finding, the District Court considered whether the speech impeded the government's abilities to perform its duties efficiently, in light of the manner, time and place of the speech, and the context within which the speech was made. In that regard, the District Court found that the Petitioners' speech could have had a detrimental impact on the department in that it brought the Petitioners' superiors' decisionmaking abilities into question, which could undermine their authority and affect morale and could also affect the coworkers who received the promotions which the Petitioners criticized. The District Court further noted that this Court had held that it was not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *See* Order of the District Court, Appendix hereto, page 11a, citing *Connick v. Myers*, 461 U.S. 138, 152 (1983).

The Petitioners subsequently appealed the decision of the District Court to the Eleventh Circuit Court of Appeals, contending that the District Court erred in its application of the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Court of Appeals *affirmed* the judgment of the District Court, however, finding that the record fully supported the

conclusions set forth in the District Court Order of May 14, 1990. *See Per Curiam* Opinion of Eleventh Circuit Court of Appeals, Appendix hereto, page 16a.

SUMMARY OF ARGUMENT

The Petitioners request the Court to grant a Writ of Certiorari based on their contention that the District Court and the Eleventh Circuit Court of Appeals, by their decisions in this case, have modified the *Pickering* balancing test, as set forth by this Court and applied in prior Eleventh Circuit cases. Petitioners contend the District Court's decision eliminated the requirement that the governmental employer demonstrate that the protected speech impeded or had the potential to impede the delivery of governmental services. The District Court's application of the *Pickering* balancing test, however, has not modified the test or eliminated any elements; rather, the application of the balancing test and reasoning of the court is fully consistent with the case law.

First, contrary to the Petitioners' intimations, for the governmental interests to outweigh the free speech interests in the context of personnel decisions, it is not necessary for the court to find that the speech actually impeded the delivery of governmental services. In fleshing out the *Pickering* decision, this Court has held that the government employer can make personnel decisions as a result of protected speech in order to promote an efficient, productive and effective workplace through maintaining discipline, positive morale and esprit de corps within its department. *See Connick v. Myers*, 461 U.S. 138, 140, 151 (1983). Thus, the *Pickering* balancing test does not require the government em-

ployer, here the Police Department, to show that because of the employee's speech it could not or potentially could not provide police services to the community. Instead, it is sufficient for the government to show that the employee's speech disrupted or had the potential to disrupt working relationships which were necessary for the efficient or effective functioning of the department, or that it impaired or had the potential to impair harmony, loyalty and discipline within the department. In this case, there was ample evidence to support the District Court's finding that the Petitioners' speech impacted or had the potential to impact upon those interests.

The Petitioners have been less than forthright in identifying the evidence supporting the District Court's finding that their speech disrupted or had the potential to disrupt relationships which were necessary to the efficient functioning of the Department, or that their speech impaired or had the potential to impair harmony and discipline within the Department. The District Court cited the testimony of Police Commissioner Fleming extensively in support of its finding that the speech at least disrupted the Petitioners' relationship with the Police Commissioner, the Chief of Police and the Assistant Chief as shown by the testimony of those individuals. Indeed, Commissioner Fleming and Assistant Chief Davis testified about the Petitioners' proclivity to disparage the decisions made by their superiors and to spread discord among the other officers. Fleming testified that the Petitioners would "complain to anyone who would listen." Fleming depo., page 28. Therefore, the record amply supports the finding that the Petitioners' speech impacted upon the working relationships of these offi-

cers and their superiors, and had the potential to impair loyalty, harmony and discipline within the Department.

Thus, the evidence fully supports the District Court's determination that the *Pickering* balancing test struck in favor of the Respondents. There is no inconsistency between the decision in this case and the decisions of this Court and prior decisions of the Eleventh Circuit Court of Appeals on the application of the *Pickering* test to First Amendment cases. Accordingly, the District Court correctly applied the *Pickering* balancing test, and this Court therefore should deny the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

ARGUMENT

THE DISTRICT COURT PROPERLY APPLIED THE *PICKERING* BALANCING TEST IN DETERMINING THAT THE GOVERNMENTAL INTERESTS OF THE POLICE DEPARTMENT OUTWEIGHED ANY FREE SPEECH INTERESTS PETITIONERS MAY HAVE HAD IN THE SPEECH WHICH CULMINATED IN THEIR DEMOTIONS

A. *Speech Upon A Matter Of Public Concern And The Pickering Test*

Contrary to Petitioners' argument, the District Court applied the proper legal principles in making its analysis of Petitioners' First Amendment claims pursuant to *Pickering* and its progeny. To prevail on a claim that an adverse employment decision violated his right to free speech, a public employee must first establish that his speech was constitutionally protected. *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). It is clear that not all

speech by government employees is subject to constitutional protection; instead, only speech upon *matters of public concern* is protected by the First Amendment. *Connick*, 461 U.S. at 147-8. The appropriate inquiry is whether the employee uttered his statement as a citizen upon a matter properly characterized as "public concern," or as an employee upon matters properly characterized as of a personal interest to him *as an employee*. And, as the District Court noted, the decision whether speech addresses a matter of public concern must be determined by the content, form and context of the speech. *See* Order, page 9a, citing *Pickering*, 391 U.S. 563, 571-72 (1968).

In this case, the content, form and context of the speech shows that the Petitioners were speaking out primarily as employees in making their derogatory remarks. The Petitioners were disgruntled about decisions made by their superiors concerning promotions, salaries, and manpower assignments, and about the fact they had not been included in the decision process. Pritchett depo., pp. 63-64. In short, Petitioners disagreed with their superiors but, rather than going through proper channels and discussing these matters with their superiors, they stirred up each others feelings about the matter, and voiced their opinions to the municipal court judge.

The District Court found that the nature and context of the Petitioners' speech indicated a personal motive. Petitioners themselves testified that they were just "blowing off steam", and that they made no attempts to communicate any of their comments to the general public. Pritchett depo., p. 80 and Brown depo., p. 59.

Under these circumstances, it is clear that Petitioners' remarks were made out of self-interest — to vent their dissatisfaction and disagreement with their superiors' decisions. Moreover, this was not the first time. As Commissioner Fleming testified, the Petitioners would complain to anyone who would listen. Fleming depo., pp. 26-28.

Indeed, the District Court found that the evidence presented indicated that the content, form and context of the Petitioners' speech supported the conclusion that the speech was an expression of personal dissatisfaction over personnel decisions and philosophical differences with their superiors. Nevertheless, the Court went on to state that since some of the Petitioners' comments may have gone beyond mere personal interest, the speech arguably may have touched upon matters of public concern. Therefore, the District Court determined that the Petitioners' speech was "mixed" — that while most of it did not relate to matters of public concern, some of it may have; thus, the District Court assumed for the purposes of its analysis that the speech was upon a matter of public concern and was constitutionally protected, and proceeded to the next stage of the First Amendment analysis, the *Pickering* balancing test.

B. *Application Of The Pickering Balancing Test*

In beginning the analysis, the District Court properly noted that even though an employee's speech may touch upon a matter of public concern, to prevail on a First Amendment claim under *Pickering*, the employee's interest in free speech must outweigh the governmental interests involved. In examining the governmental interests at stake, the court must consider

whether the speech at issue impeded the government's ability to perform its duties efficiently, in light of the manner, time and place of the speech, and the context within which the speech was made.

Even if an employee's speech touches upon a matter of public concern, the government employer can make personnel decisions as a result of the speech where the government's interests in maintaining an efficient, productive and effective work place outweigh the employee's interests in speaking out. *Connick*, 461 U.S. 138, 140. To maintain an efficient and productive work place, the government has an interest in "maintaining discipline, positive morale and esprit de corps within its governmental offices." *Id.* at 151. Thus, the employee's remarks and the degree to which they relate to public concern must be weighed against the relative strength of the government interests; the weaker the public concern, the lesser of a showing is required to tip the balance in the employer's favor. *Id.* at 152, *see also Eiland v. City of Montgomery*, 797 F.2d 953, 958 (11th Cir. 1986).

Particular to this case, the Eleventh Circuit Court of Appeals has held that a police department has compelling interests in maintaining discipline, morale and loyalty among its officers, especially its supervisory officers. *See Waters v. Chaffin*, 684 F.2d 833, 836 (11th Cir. 1982) (the government's interest in regulating its police force can be especially compelling); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1968). Furthermore, in considering the police department's interests, the Court of Appeals has stated that the trial court should also examine the statements to see whether they

"[impair] discipline by superiors or harmony among co-workers, or have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989), quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Here, the evidence shows that Respondents reasonably believed that Petitioners' remarks and attitude would adversely affect those interests, and their decision to demote is supported by case law.

In *Bryson*, the plaintiff had become increasingly dissatisfied with personnel decisions made by the Chief of Police, particularly when a favorable job assignment he desired had been given to another officer, and he complained about it to fellow officers. During the same time, he also lodged a complaint against the Chief, alleging that he had stolen some items from the evidence room. The plaintiff also made verbal complaints about other alleged improprieties in the Chief's conduct. The formal complaint against the Chief was ultimately dismissed, and the Chief later demoted the plaintiff. In bringing a civil rights action, the plaintiff claims his demotion was in retaliation for his exercise of free speech (the complaint against the Chief).

The trial court concluded that the complaint was a matter of public concern, but struck the *Pickering* balance in favor of the City in light of the fact that plaintiff's complaint and other allegations against the Chief necessarily impaired the relationship among the superior officers and impacted upon morale. In affirming, the Court of Appeals held that since the employee's speech occurred within the context of an ongoing per-

sonnel dispute, "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Id.* at 1567, quoting *Connick*, 461 U.S. at 153.

The facts of the present case are analogous. Petitioners had complained about the management of the Department in the past, and their recent remarks to the judge further demonstrated their disloyalty to their employer. This time Petitioners were dissatisfied with promotions and man power assignments which had been made by their superiors. Petitioners held the opinion that one officer who was promoted was too immature to be on the road, and that another officer, a female, had been promoted simply because she was a female. Brown further criticized the decision to promote the female officer because he did not think she had "supervisory abilities." Brown depo., pp. 59-61.

Regardless of the merits of their opinions, Petitioners simply disagreed with their superiors. And, instead of keeping their opinions to themselves or discussing them with their superiors through the chain of command, they spoke out to each other, thereby encouraging each others' dissatisfaction, and expressed their complaints to a municipal court judge. Furthermore, like the plaintiff in *Bryson*, the Petitioners complained to everyone who would listen, and the Respondents quite naturally were concerned about the detrimental impact this would have upon harmony and discipline within the Department.

Therefore, as in *Bryson*, Petitioners' speech was merely a manifestation of an ongoing disagreement between Petitioners and their superiors as to the operation

of the Department. As such, their speech is not entitled to constitutional protection in light of the important governmental interests at stake. Petitioners' speech does not merit constitutional protection in comparison to the Department's interests because the nature of the remarks and the context in which they were made demonstrated that they were disloyal to the superiors, might not be obedient to orders, and would seek to undermine their authority. Thus, consistent with the *Bryson* rationale, the District Court properly struck *Pickering* balance in favor of the Police Department.

Furthermore, Petitioners' speech must be considered as a whole and in light of their past behavior, and not merely on whether the particular comments made during that one incident with the municipal judge actually disrupted police functions. As the Seventh Circuit Court of Appeals has stated, the court should view the employee's statements in light of previous behavior, and should consider the speech's "cumulative disruptive effect" on the employer's ability to maintain harmony and discipline in the workplace. *See Hessee v. Board of Education*, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1128, 103 L.Ed.2d 190 (1989).

In conducting such an examination into the facts in this case, it is clear that Petitioners' remarks about decisions made by their superiors indicated they were not supportive of the decisions and were inclined to criticize the decisions to other officers. Petitioners' inclination to spread discord is evidenced by the fact that they were complaining to each other *and* to the municipal judge, and that they had complained before. Such conduct plainly has the potential to disrupt discipline and har-

mony within the police force. Common sense dictates that Petitioners' comments would promote discord and dissension among co-workers, and would impair the relationship between these officers and their superiors. Thus, Petitioners' speech had the clear potential to detrimentally impact upon the City's ability to regulate its police force, which is a compelling governmental interest.

Indeed, for officials at the Doraville Police Department to effectively and efficiently run the Department they must be able to require loyalty from supervisory level officers upon whom they depend to implement their policies and decisions, or else their efforts will be frustrated. Petitioners' remarks to the judge and their ongoing disagreement with these officials as to how the Department should be run amply demonstrated Petitioners' disloyalty and unreliability. Moreover, Petitioners' criticism of decisions made by Major Davis and Chief Everett further eroded the relationship between those officials and Petitioners as supervisory officers. Without a doubt, harmonious working relationships among supervisory officials at a police department must exist for it to function efficiently and effectively. Such relationships are severely strained, if not destroyed, when supervisory level officers, such as Petitioners were, criticize management's decisions among themselves and to other officers.

C. *Actual Disruption Of Services Is Not Required To Strike Balance In Favor Of The Governmental Interests At Stake*

Petitioners, however, contend that *actual* disruption or impact upon the delivery of police services must

be shown. That is not the case. While the evidence here *does* show actual disruption of the relationship among Chief Everett, assistant Chief Davis, and the Petitioners as supervisory officers, such a showing is *not* required. The District Court correctly noted that it is not necessary for the government to show *actual* disruption of its ability to provide certain services or actual impairment of discipline or harmony among co-workers. Indeed, this Court's decision in *Connick* provides for an inquiry into the *potential* disruption which could occur.

In *Connick*, the Court held that an employer does *not* have to allow events to deteriorate to the point of actual disruption before taking action. *Connick v. Myers*, 461 U.S. at 152; *see also Eiland*, 797 F.2d at 958. However, this Court cautioned that there is only the potential for disruption then "a stronger showing may be necessary *if* the employee's speech more substantially involved matters of public concern." *Id.* Here, the personal nature of most, if not all, of the Petitioners' remarks militates against the need for a "stronger showing" on the part of the government, and the impact of Petitioners' speech upon the relationships between these individuals and their superiors tips the balance in favor of the Respondents.

In considering the employee's speech as a whole and its cumulative disruptive effect, it is sufficient if the employee's speech *demonstrates* a lack of loyalty to superior officers and policy makers, or shows that the employee was inclined to spread discord to other employees. While actual disruption is not required, the evidence shows there was disruption of harmony between these supervisory officers and their superiors

(relationships necessary to the operation of the Police Department) in that the Chief, Major Davis and Police Commissioner Fleming were upset over Petitioners' remarks about their decisions. Furthermore, the speech indicated to the Respondents that they could not rely upon the Petitioners to support their policies and to promote loyalty and discipline among the officers they supervised.

In addition to erroneously arguing that to tip the balance in favor of the governmental interests it must be shown that the employee's speech actually impeded the delivery of police services, the Petitioners contend that there is no evidence that their speech would have had a detrimental effect on the operation of the Police Department. The Petitioners represent that the only evidence relied upon by the District Court to support its finding was the deposition testimony of Commissioner Fleming, which they argue is "devoid" of any evidence that the speech would have had a detrimental effect upon the operation of the Police Department. Petitioners state that Fleming's testimony reveals only his personal opinion that Petitioner Brown "may have discussed 'his thoughts' with other patrolmen on a previous occasion" and that Brown had written a letter some two years prior to his demotion. *See* Petition for Writ of Certiorari, page 11-12.

The evidence, however, is not so limited. The testimony of the Chief, Major Davis and Commissioner Fleming all show that they were upset over the Petitioners' remarks about their decisions and the operation of the Department. Moreover, Commissioner Fleming testified that the Petitioners had been com-

plaining about morale and their dissatisfaction with policies set by their superiors over many months, and that Petitioner Brown "was creating morale problems by discussing his thoughts with all the patrolmen, making people choose sides." *See* Order of the District Court, Appendix hereto, page 13a. The District Court further noted that Davis testified that the Petitioners "always did gripe a lot." *Id.* This testimony, therefore, demonstrated the effect the Petitioners' comments had upon their superiors and fellow officers, particularly in light of their past behavior, and provided ample evidence of disruptive impact.

Therefore, consistent with this Court's decision in *Connick*, the Respondents were justified in demoting the Petitioners and were not required to wait until actual disruption manifested. Even where an employee's speech addresses matters of public concern, the public employee may only voice those opinions when it outweighs the state's interests in promoting efficiency, fostering loyalty and obedience to superior officers, maintaining morale, and instilling public confidence in its police force. In this case, the City of Doraville's interests clearly outweighed Petitioners' interests in free speech given the primarily personal nature of the Petitioners' remarks, the Petitioners' history for complaining about their superiors' decisions, and the disruption of important working relationships.

CONCLUSION

The District Court properly applied the *Pickering* balancing test and determined that the evidence tipped the balance in Respondents' favor. Under *Pickering* and its progeny, the court weighed the important govern-

ment interests of the Police Department in maintaining loyalty and discipline among its police officers, especially supervisory officers, and in promoting harmony among its officers and officials against the Petitioners' free speech interests. In considering all the evidence, the District Court found that the evidence showed that Petitioners' speech impaired their relationships with their superiors *and* had the potential to disrupt the effective and efficient operation of the Police Department by detrimentally impacting upon the harmony, loyalty and discipline among the officers. Therefore, the court held that the City of Doraville's interests outweighed any free speech interests Petitioners may have had in their remarks, and that the Respondents were justified in demoting Petitioners from their positions of rank. The District Court correctly applied the *Pickering* balancing test, and its decision is fully supported by the record.

For these reasons, Respondents respectfully urge the Court to deny the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX OF RESPONDENTS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT J. BROWN and :
HENRY M. PRITCHETT :

CIVIL NO. 1:89-cv-189-ODE

vs. :
:
THE CITY OF DORAVILLE, :
GENE LIVELY, Individually, :
and as Mayor of the City of :
Doraville, GEORGE EVERETT, :
Individually, and as Chief :
of Police of the City of :
Doraville, WILLIAM F. DAVIS, :
Individually, and as Captain :
of the City of Doraville :
Police Department :

ORDER

This civil rights action is before the court on Defendants' motion to extend time to file motion for summary judgment and for summary judgment. Plaintiffs move to strike Defendants' motion for summary judgment and their reply brief.

This action arose after Plaintiffs, who work for the Doraville, Georgia police department, were demoted to the rank of patrolmen, effective September 10, 1988.[1] The alleged reason for their

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[1] Plaintiff Brown was demoted from the rank of sergeant; Plaintiff Pritchett from the rank of lieutenant.

demotions was a violation of general order 86-02, which covers the chain of command in relation to personnel grievances.[2] It specifically prohibits personnel from contacting any elected official with regard to any request or grievance without first informing their superiors in the police department.

The purported violation of the chain of command rule arose from a conversation in a parking lot between Plaintiffs and a municipal court judge after court on September 13, 1988, while Plaintiffs were off duty. At his deposition, Plaintiff Brown testified that just prior to the conversation at issue, he and Plaintiff Pritchett were criticizing some promotions made that day by their superiors. Plaintiff Brown stated that they "were a little ill and were blowing off some steam." He indicated that the judge "was drawn into the conversation by

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[2] General order 86-02, dated November 1, 1986, states:

> The phrase "CHAIN OF COMMAND" is defined as: The orderly passing on of orders, complaints, requests and discipline from all personnel.
>
> The CHAIN OF COMMAND will apply to all matters of official business. At no time will any personnel contact any *Elected Official* in reference to a request or grievance without following the departmental chain of command.
>
> The General Order relating to CHAIN OF COMMAND will also cover Judges of the Municipal Court of Doraville.
>
> No officer will contact them with a complaint or grievance regarding a case disposition without first following the CHAIN OF COMMAND ....

that" as he left the courthouse and passed them. Plaintiffs both testified that the conversation then continued in the same vein in the presence of the judge.

Specifically, Plaintiff Brown testified that he told the judge that he was upset over the promotions. He stated that he probably named at least two individuals whose promotions he felt were a mistake. He testified that told the judge why he was upset. His testimony indicates that the reasons he disagreed with the promotions were because one individual, who was promoted from a radio position to a patrol officer, was immature. At his deposition, he also stated that he discussed the promotion of a female officer, who he felt lacked supervisory and decisionmaking abilities and was not punctual; he stated that he felt she was promoted because of her sex. Plaintiff Brown also testified that he told the judge the reasons he was upset over a third promotion. The reasons he stated were that the officer was promoted because of his ticket writing and he was concerned because earlier, the officer had punched an arrestee in the mouth. Plaintiff Brown also testified that he probably mentioned his concern about some maintenance work done on a city property, a fence built at a local park and grass purchased that were done without bids. He was unsure about whether he simply expressed his concerns over things being done without bids, or discussed the above mentioned details specifically.

Plaintiff Pritchett testified that they also discussed the department's emphasis on ticket produc-

tion at the expense of patrols of the residential and business districts and concerns about job security. He also stated they discussed the inexperience of one officer who was promoted, his concern regarding the reluctance of the female officer in responding to calls and that a third officer was promoted for his ticket production.

At his deposition, Plaintiff Brown indicated that he spoke to the judge as a friend, not as a public official and he asked the judge to keep the conversation confidential. Plaintiff Brown stated that it was not his intention that the conversation, which lasted fifteen or twenty minutes, be made public.

The judge stated at his deposition, when asked about the conversation at issue, that Plaintiffs

> were upset about some promotions that had just been announced that day...they were angry... They were concerned about one or two officers, who I don't think they felt should have been promoted. They were concerned about the ticket situation. They felt too much emphasis was being placed on the number of tickets that were being written as opposed to the policing that was being done.

The judge also said that they were concerned about the overzealousness of some officers in handling arrests. The judge stated that when the conversation was over, he told Plaintiffs he would make a discrete inquiry about these matters the next morning.

Subsequently, the judge asked the city attorney about these issues. According to the judge's deposition testimony, on hearing the substance of the complaints, the city attorney immediately identified Plaintiffs as the speakers and contacted several other city officials, including Defendant Lively, the mayor, and Defendant Fleming, the police commissioner.[3]

After learning of the conversation at issue, Defendant Davis, the acting chief of police, allegedly determined that disciplinary action was appropriate. He and Defendant Fleming subsequently discussed the matter with Defendant Everett, the police chief, who was hospitalized. The men allegedly agreed that Plaintiffs should be demoted.

On September 15, 1988, Defendants Davis and Fleming met with each Plaintiff and presented them a memorandum which they and Defendant Everett had signed, recommending their demotion for violating the chain of command rule with regard to their conversation with the judge. Plaintiffs allege that they were told by Defendant Fleming that they had no loyalty and had hurt the mayor's feelings.

Plaintiffs claim that the demotion violated their first amendment rights, in that the conversation touched on matters of public concern. They assert that general order 86-02 is unconstitutionally

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[3] The record indicates that at least one of Plaintiffs had expressed these concerns to various Doraville officials before.

vague and overbroad as applied and that they did not violate it because the judge contacted them and the conversation occurred while they were off duty. Plaintiffs also assert that Defendants demoted them without due process of law. Plaintiffs further allege that the police department's practice of concentrating its officers' efforts in traffic related duties is potentially dangerous to the community.

Plaintiffs seek reinstatement to their former ranks and recovery of all accrued salary and benefits they would have received absent the demotion. In addition, they seek compensatory and punitive damages, costs and fees.

Defendants move for summary judgment,[4] asserting that Plaintiffs are at will employees who have no property interest in their positions. Thus, according to Defendants, both Plaintiffs' procedural due process claims and the substantive due process claims relating to general order 86-02, must fail. Defendants further argue that in this circuit a valid substantive due process claim must allege facts so egregious that they shock the conscience. They maintain that no such evidence exists in this case. Defendants further contend that the city has a compelling interest in maintaining order and

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[4] Defendants' motion for an extension of time in which to file this motion is GRANTED. Justice and judicial economy will be better served by reaching the merits of Defendants' motion. For the same reason, Plaintiffs' motion to strike Defendants' motion for summary judgment and their reply brief on timeliness grounds are DENIED.

discipline in the police department which is promoted by the general order.

In addition, Defendants assert that they are entitled to qualified immunity because no reasonable official would have known that their actions violated clearly established law in light of the city charter's authorization that they could fire, hire and supervise city employees.

As to Plaintiffs' first amendment claims, Defendants maintain that the speech at issue addressed personnel matters and did not touch on matters of public concern. Defendants cite Plaintiffs' own testimony as evidence. Defendants further argue that even if Plaintiffs' speech touched on matters of public concern and was therefore covered by the first amendment, their demotions were justified absent the protected speech. Defendants assert that, as stated in the demotion memo, Plaintiff Pritchett failed to properly perform supervisory duties and Plaintiff Brown had previously violated the chain of command order by surreptitiously sending several officials, including Defendant Lively, the mayor, a letter criticizing the way the police department was being run. Defendants further state that even if Plaintiffs' speech was protected, the compelling governmental interest in the organized, disciplined and orderly operation of the police department outweighs the Plaintiffs' interest in speaking out on these matters.

In response, Plaintiffs argue that their conversation with the judge addressed matters of legitimate public concern, thus triggering first amend-

ment protection. These matters included the pressure being placed on patrol officers to issue traffic citations, rather than protecting homes and businesses and the department's promotion policy, which purportedly was based on the amount of revenue generated through traffic citations. In support of this contention, Plaintiffs present testimony from several of their fellow officers asserting that they were pressured to issue traffic citations, the production of which would be rewarded by salary increases and promotions. Plaintiffs state that using traffic law enforcement to raise revenue violates O.C.G.A. § 40-6-9(b). Plaintiffs further maintain that their speech in no way impeded police functions, thus their first amendment interest outweigh any of Defendants' interests in maintaining departmental discipline and loyalty.

As to the due process claim, Plaintiffs maintain that general order 86-02 only prohibits officers from complaining to judges about the disposition of cases. They argue that they did not violate the chain of command rule because their speech did not involve the disposition of a case. Plaintiffs assert that they possess a legitimate claim of entitlement to be free from adverse personnel action pursuant to the rule when their actions did not violate it. They maintain that Defendants' application of the rule denied them substantive due process.

Plaintiffs further argue that Defendants are not entitled to qualified immunity, because the chain of command rule was not violated. They also assert that the contours of their first amendment rights

under these circumstances are sufficiently well established that a reasonable person in Defendants' position would have known that the demotions were unconstitutional.

Summary judgment is appropriate only if the evidence reveals the absence of any genuine issues of material fact and shows that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The evidence must be viewed in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In order for the first amendment claim to survive Defendants' motion, Plaintiffs must establish that they were engaged in a protected activity. *Connick v. Myers*, 461 U.S. 138, 147 (1983). In this context, for speech to be protected, it must touch on "a matter of legitimate public concern upon which free and open debate is vital to informed decision-making by the electorate." *Id.* at 145 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968)). Whether such speech addresses a matter of public concern must be determined by its "content, form and context...as revealed by the entire record." *Id.* If this threshold requirement is met, then the court must examine the evidence and weigh the employee's interest in speaking out on a matter of public concern against the employer's interest in maintaining an efficient and productive workplace. *Id.* at 140.

The evidence presented indicates that the content of the speech at issue primarily concerned Plaintiffs' philosophical differences with their supe-

riors over the appropriateness of promotions and the connection between promotions and traffic citation production. Its form and context, in a casual conversation following several promotions with which Plaintiffs did not agree, supports the conclusion that the speech was an expression of personal dissatisfaction over personnel decisions.

The court is of the opinion that for most part, Plaintiffs were speaking out as employees on matters of personal interest relating to personnel assignments and promotion criteria, not on matters of public concern. The alleged aggressiveness of one officer who received a promotion might arguably address a matter of public concern. However, the context in which this was raised is so intimately connected with the criticisms over promotions, that in this situation it does not rise to the level of constitutionally protected speech.

Yet, "the meaning of the term 'public concern' is not without ambiguity." *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1989). The unavailability of patrolmen to respond to calls because of their assignment in radar units and Plaintiff Brown's testimony regarding the absence of bidding on certain municipal projects are issues of more than personal interest. Therefore, since some of Plaintiffs' speech arguably addresses matters of public concern, the court will proceed to the next step required in a first amendment analysis, the weighing of the parties' interests. Because Plaintiffs' speech is "mixed," in that some of it may relate to matters of public concern and some does not, it will all be treated as pro-

tected for the purposes of this analysis. *Kurtz*, 855 F.2d at 733.

The first amendment balancing test "is not performed in a vacuum." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). The court may consider the circumstances surrounding a personnel decision. *Id.* Moreover, the government's burden in justifying its action "varies depending on the nature of the employee's expression." *Connick* at 150.

In its analysis, among the things the court must consider are "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989).

On the issue of to whether Plaintiffs impeded the government's efficiency, the court must examine "whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

In this case, Plaintiffs' speech could have a detrimental impact on the department, in that it brought Plaintiffs' superiors' decisionmaking abilities into question, which could undermine their authority and affect morale. It could also affect the co-workers who received the promotions.

Moreover, the statements were made about individuals with whom Plaintiffs worked closely. *Pickering*, 391 U.S. at 572. Defendant Fleming testified that in his discussion with Defendant Davis and Everett regarding the decision to demote Plaintiffs he cited Plaintiffs' disloyalty to the department as superior officers. He characterized Plaintiff Brown as an instigator of a morale problem by criticizing promotions and not accepting the city's decision, which he defined as disloyalty. Admittedly, there is no direct evidence that the statements at issue here had any impact, other than Defendants' perception of disloyalty and the threat to discipline by Plaintiffs' alleged violation of the chain of command. However, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick* at 152.

Basically, the time, place and manner of the speech weighs in Plaintiffs' favor. They were off duty, outside the department and the statements were made in what they considered to be a private conversation. However in continuing the conversation in the presence of the judge, Plaintiffs violated the spirit, if not the strictly construed letter of the chain of command rule, which strengthens Defendants' position. *See Connick* at 153 n. 14.

As to the context in which the speech was made, this is not a case where employees, out of their disinterested civic concern, discussed the city's emphasis on ticket production and municipal bid-

ding[5] with an official. It was no coincidence that the conversation at issue occurred on the heels of several promotions. Moreover, Defendant Fleming testified that Plaintiffs had been complaining about morale and their dissatisfaction with policies set by their superiors over many months and that Plaintiff Brown "was creating...[morale] problems by discussing his thoughts with all the patrolmen, making people choose sides." Lieutenant Davis also testified that Plaintiffs "always did gripe a lot."[6]

Connick held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The evidence is uncontroverted that the promotions were the conversation's focus. It touched matters of public concern only in the most limited sense. The speech at issue is most fairly characterized as an expression of employee dissatisfaction with office pol-

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[5] When Plaintiffs and the judge were asked on deposition what was said outside the courthouse, only Plaintiff Brown recalled mentioning the bidding issue.

[6] In addition, several years earlier, Plaintiff Brown sent a five page letter to the mayor, the police chief and Defendant Davis criticizing personnel decisions, including a decision involving one of the individuals Plaintiff later discussed with the judge. The letter indicated that he discussed the propriety of this individual's promotion with others in the department.

icy. The limited first amendment interest involved in this case did not require Defendants to tolerate what they viewed as a violation of the chain of command rule and behavior undermining their authority.[7]

The court turns to the substantive due process issue.[8] Even if Plaintiffs did not violate the rule, their substantive due process claim cannot survive Defendants' motion.

Substantive due process is violated only when the government's actions "'shocks the conscience' or constitutes force that is to 'brutal' as to 'offend even hardened sensibilities.'" *Faucher v. Rodziewicz*, 891 F.2d 864, 871 (11th Cir. 1990) (quoting *Rochin v. California*, 342 U.S. 165, 172-173 (1952)). The application of the chain of command rule in this case does not constitute such an action.

Because Defendants did not violate Plaintiffs' constitutional rights, the court need not reach the issue of qualified immunity.

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[7] Under these circumstances, where the chain of command rule does not regulate speech in a public forum and does not prohibit speech to elected officials, but only channels its direction, and where Defendants have asserted a compelling interest in the orderly and effective operation of the police department, the court likewise cannot say that general order 86-02 violates the first amendment. *See Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

[8] Because Plaintiffs do not address the procedural due process issue in their response and it appears that they were at will employees, the court assumes Plaintiffs do not contest that aspect of Defendants' motion.

Accordingly, defendants' motion for an extension of time in which to file a motion for summary judgment is GRANTED. Plaintiffs' motion to strike Defendants' motion for summary judgment and their reply brief are DENIED. Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 14th day of May, 1990.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8566

D.C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(December 18, 1990)

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM:

The sole issue presented in this appeal is the correctness of the balancing done in accord with *Pickering v. Board of Education*, 391 U.S. 563 (1968).

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

We find the record fully supports the conclusions of the district court as set forth in its Order of May 14, 1990.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8566

ROBERT J. BROWN and HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 18, 1990, 11th Cir., 19__, ___ F.2d ___).

Before: FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM.

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Civil Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/10)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8566

D.C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 18, 1990

For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 6 1991